

Craig E Kleffman v. Vonage Holdings Corp et al

Doc. 5

Judith B. Gitterman, Bar No. 115661  
 JGitterman@perkinscoie.com  
 PERKINS COIE LLP  
 1620 26th Street  
 Sixth Floor, South Tower  
 Santa Monica, CA 90404-4013  
 Telephone: 310.788.9900  
 Facsimile: 310.788.3399

Elizabeth L. McDougall, *pro hac vice*  
 EMcDougall@perkinscoie.com  
 Rebecca S. Engrav, *pro hac vice*  
 REngrav@perkinscoie.com  
 PERKINS COIE LLP  
 1201 Third Avenue, Suite 4800  
 Seattle, WA 98101-3099  
 Telephone: 206.359.8000  
 Facsimile: 206.359.9000

Attorneys for Defendants  
 VONAGE HOLDINGS CORP.,  
 VONAGE AMERICA, INC.,  
 and VONAGE MARKETING, INC.

Bill ☒  
 Fees Pd ☒  
 Frms Gvn ☐  
 CAD ☐  
 TDO ☐  
 Ntc/Dkt Mld ☐  
 FP Frms Gvn ☐

07 AUG 23 PM 4:20  
 U.S. DISTRICT COURT  
 CENTRAL DISTRICT OF CALIF.  
 LOS ANGELES

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY  
 FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL (COUNSEL  
 (OR PARTIES) AT THEIR RESPECTIVE, MOST RECENT, ADDRESS OF  
 RECORD, IN THIS ACTION, ON THIS DATE.

DEPUTY CLERK

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

CRAIG E. KLEFFMAN, individually  
 and on behalf of all others similarly  
 situated,

Plaintiff,

v.

VONAGE HOLDINGS CORP., a New  
 Jersey corporation; VONAGE  
 AMERICA, INC., a wholly owned  
 subsidiary; and VONAGE  
 MARKETING, INC., a wholly owned  
 subsidiary,

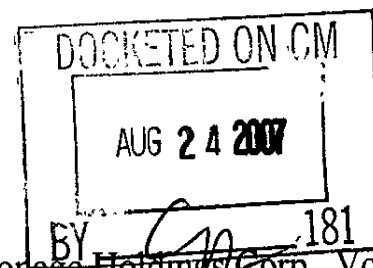
Defendants.

Case No. CV 07-2406 GAF (JWJx)

CLASS ACTION

**DEFENDANTS' NOTICE OF  
 APPEAL**

Crtm: 740 [255 E. Temple St.]  
 Hon. Gary A. Feess



Notice is hereby given that defendants Vonage Holdings Corp., Vonage  
 America, Inc. and Vonage Marketing, Inc. hereby appeal to the United States Court  
 of Appeals for the Ninth Circuit from the order denying Vonage's Motion for

1 Attorneys' Fees Under the CLRA entered in this action on July 9, 2007, and the  
2 final judgment entered on July 13, 2007, to the extent it addresses this issue. True  
3 and correct copies of the order and judgment are attached hereto as Exhibits 1 and  
4 2, respectively. Specifically, defendants appeal only the portion of this order and  
5 the judgment relating to denial of their motion for attorneys' fees under the  
6 Consumer Legal Remedies Act, Cal. Civ. Code Section § 1780(d).

7 Defendants concurrently submit their filing fee pursuant to FRCP 3(e) and  
8 file their Civil Appeals Docketing Statement with Statement of Representation  
9 pursuant to Circuit Rules 3-2 and 3-4.

10 Respectfully submitted,

11  
12 DATED: August 23, 2007

PERKINS COIE LLP

13 By: Elizabeth L. McDougall  
14 Elizabeth L. McDougall *by p. 212*

15 Attorneys for Defendants  
16 VONAGE HOLDINGS CORP.,  
17 VONAGE AMERICA INC., and  
18 VONAGE MARKETING INC.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

SCA#225

3

2

1

LINKS: 26, 27

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No.	CV 07-2406 GAF (JWJx)	Date	July 5, 2007
Title	Kleffman v. Vonage Holdings Corp., et al.	DOCKETED ON CM	
Present	The Honorable	JL - 9 2007	
	GARY ALLEN FEES	BY	002
Marilynn Morris	None	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
None	None		

Proceedings: (In Chambers)

**ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND  
AND DEFENDANTS' MOTION FOR ATTORNEY'S FEES****I. INTRODUCTION & BACKGROUND**

Plaintiff Craig Kleffman received spam emails advertising Vonage telephone services, and has attempted to hold Vonage liable under various state statutes. This Court previously granted Vonage's motion to dismiss Plaintiff's complaint with prejudice and without leave to amend. Undeterred, Plaintiff now seeks leave to amend, bringing a proposed amended complaint that repackages his previously rejected theory under Cal. Bus. & Prof. Code § 17529.5, and also proposes a new claim under Cal. Bus. & Prof. Code § 17200. Separately, Vonage moves for an award of attorney's fees on the basis that Plaintiff's Consumer Legal Rights Act ("CLRA") claim, which the Court previously dismissed as well, was brought in bad faith. As discussed briefly below, both motions are **DENIED**.

**II. PLAINTIFF'S MOTION FOR LEAVE TO AMEND**

As to Plaintiff's motion, both proposed claims assert the same factual backdrop as the claims in the original complaint: that Vonage Plaintiff received spam emails from Vonage, which were sent from domain names that did not identify Vonage as the sender but which, when opened, clearly and unambiguously identified Vonage and referred the recipient to Vonage's phone services. The motion for leave to amend fails, however, both because it essentially asks for reconsideration but fails to comply with the relevant Local Rule (L.R. 7-18), and also because the amendment would be futile, as the proposed claims are incognizable.

LINKS: 26, 27

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No.	CV 07-2406 GAF (JWJx)	Date	July 5, 2007
Title	Kleffman v. Vonage Holdings Corp., et al.		

Plaintiff contends that his section 17529.5 claim is now cognizable because he does not now purport to tell Vonage what it can and cannot do. (Reply Leave to Amend at 3.) This argument is perplexing, because if Vonage were found liable, that would seem a strong indication that it had done something it should not have. Moreover, the theory that Vonage's email headers misrepresented its identity is no more cognizable than Plaintiff's original claims. Under the facts pled, Vonage contracted through third parties which owned the domain names that were used, and thus the messages were traceable to their sender and did not require inclusion of the word "Vonage" to make them truthful. This does not state a claim under section 17529.5. Moreover, even if it did, the claim would be preempted by the CAN-SPAM Act, since there is no traditional tort for inducing a potential customer to read an advertisement, nor for fooling a spam filter.

The proposed section 17200 claim fares no better. Plaintiff lacks standing to bring the claim because he alleges no deprivation of "money or property" as a result of Vonage's conduct. Cal. Bus. & Prof. Code § 17203. Moreover, he cannot show Vonage's conduct was "unlawful," so against public policy as to be "unfair," or "deceptive." E.g., Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc., 107 Cal. App. 4th 1336, 1342 (Ct. App. 2003).

**III. VONAGE'S MOTION FOR ATTORNEY'S FEES UNDER THE CLRA**

As to Defendant's motion, the Court agrees that Plaintiff has not represented himself particularly well in attempting to turn California's consumer protection laws into his personal ATM machine. At the same time, the Court cannot say that Plaintiff's CLRA claim was so far off the mark as to indicate bad faith, and his aggressive settlement tactics are no different than many other litigants'. Therefore, absent subjective bad faith, Vonage cannot receive attorney's fees under the CLRA. Cal. Civ. Code § 1780(d); Corbett v. Hayward Dodge, Inc., 119 Cal. App. 4th 915, 924 (Ct. App. 2004).

**IV. CONCLUSION**

For the foregoing reasons, both parties' motions are **DENIED**. The hearings on both matters, previously scheduled for Monday, July 9, 2007 are hereby **VACATED**. Fed. R. Civ. P. 78; Local Rule 7-15. Vonage is **ORDERED** to submit a proposed judgment no later than close of business on **Thursday, July 12, 2007**.

IT IS SO ORDERED.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

08/09/2007

08:41

FIRST LEGAL SUPPORT

X (213) 250-1197

RECEIVED

JUL 16 2007

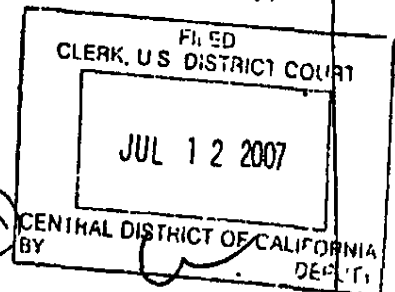
ORIGINAL PERKINS COIE

Judith B. Gitterman, Bar No. 115661  
 JGitterman@perkinscoie.com  
 PERKINS COIE LLP  
 1620 26th Street  
 Sixth Floor, South Tower  
 Santa Monica, CA 90404-4013  
 Telephone: 310.788.9900  
 Facsimile: 310.788.3399

Elizabeth L. McDougall, *pro hac vice*  
 EMcDougall@perkinscoie.com  
 Rebecca S. Engrav, *pro hac vice*  
 REngrav@perkinscoie.com  
 PERKINS COIE LLP  
 1201 Third Avenue, Suite 4800  
 Seattle, WA 98101-3099  
 Telephone: 206.359.8000  
 Facsimile: 206.359.9000

Attorneys for Defendants  
 VONAGE HOLDINGS CORP.,  
 VONAGE AMERICA INC.,  
 and VONAGE MARKETING INC.

✓ Docketed  
 ✓ Copies / NTC Sent  
 ✓ JS - 5 / JS - 6  
 ✓ JS - 2 / JS - 3  
 ✓ CLSD



THIS CONSTITUTES NOTICE OF ENTRY  
 AS REQUIRED BY FRCP, RULE 77(d).

FAXED

UNITED STATES DISTRICT COURT  
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

CRAIG KLEFFMAN,  
 individually and on behalf of all  
 others similarly situated,

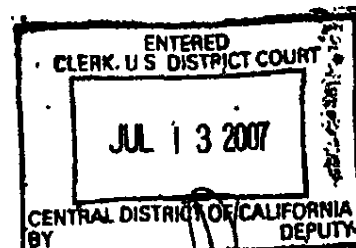
Plaintiff,

v.

VONAGE HOLDINGS CORP., a  
 New Jersey corporation, VONAGE  
 AMERICA, INC., a wholly owned  
 subsidiary, and VONAGE  
 MARKETING, INC., a wholly  
 owned subsidiary,

Defendants.

No. CV 07 2406 GAF (JWJx)  
 [PROPOSED] JUDGMENT



This action came on for hearing before the Court, the Honorable Gary A. Feess, United States District Judge, Presiding, on May 21, 2007, on Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) and on July 9, 2007, on Plaintiff's Motion for Leave to Amend and Defendants' Motion for

[PROPOSED] JUDGMENT

61530-0004/LEGAL13381390 1

08/09/2007

08:41

FIRST LEGAL SUPPORT

AX (213) 250-1187

1 Attorneys' Fees Under CLRA § 1780(d). The arguments presented having been  
2 fully considered, the issues having been duly heard and decisions having been duly  
3 rendered, IT IS ORDERED AND ADJUDGED that the plaintiff and putative  
4 classes take nothing, that amendment of the complaint is futile and leave to amend  
5 is therefore denied, that the action be dismissed with prejudice on the merits, and  
6 that defendants recover their costs as prevailing parties in this action in the amount  
7 of \$ \_\_\_\_\_ (to be determined by the Clerk of the Court).

8  
9 DATED: 7/12, 2007

  
The Honorable Gary A. Fees  
United States District Judge



**PROOF OF SERVICE - MAIL**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am and was at all times herein mentioned employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action or proceeding. My business address is 1620 26<sup>th</sup> Street, Sixth Floor, Santa Monica, California 90404.

On August 23, 2007, I served true and correct copies of Defendants' Notice of Appeal on the interested parties in this action by placing said document enclosed in a sealed envelope (for collection and mailing, with postage thereon fully prepaid, on the same date, following ordinary business practices) in an internal collection basket, addressed as follows:

Attorneys for Plaintiff

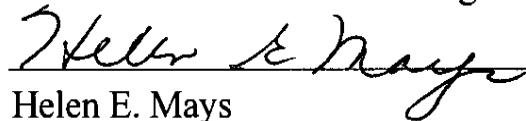
Steve W. Berman, Esq.  
Hagens Berman Sobol Shapiro LLP  
1301 Fifth Avenue, Suite 2900  
Seattle, WA 98101  
Tel: 206-623-7292; Fax: 206-623-0594  
Steve@hbsslaw.com

Attorneys for Plaintiff

Reed Kathrein, Esq.  
Hagens Berman Sobol Shapiro LLP  
715 Hearst Avenue, Suite 202  
Berkeley, CA 94710  
Tel: 510-725-3000; Fax: 510-725-3001  
Reed@hbsslaw.com

I am readily familiar with this business's practices concerning collection and processing of correspondence for mailing with the United States Postal Service, and declare that correspondence is deposited with the United States Postal Service on the same day it is internally collected at Perkins Coie LLP in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct; that I am employed in the office of a member of the Bar of this Court at whose direction this service was made; and that this Proof of Service was executed on August 23, 2007, at Santa Monica, California.

  
Helen E. Mays

**PROOF OF SERVICE - MESSENGER**

(C.C.P. § 1011)  
(F.R.C.P. 5(b))

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

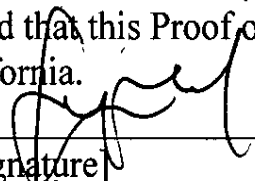
I am and was at all times herein mentioned employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action or proceeding. My business address is First Legal Support Services, 1511 W. Beverly Boulevard, Los Angeles, California 90026.

On August 23, 2007, I served true copies of Defendants' Notice of Appeal on the interested parties in this action by hand-delivering a true copy thereof to the following:

Attorneys for Plaintiff

Elaine T. Byszewski, Esq.  
Hagens Berman Sobol Shapiro LLP  
700 South Flower Street, Suite 2940  
Los Angeles, CA 90017-4101  
Elaine@hbsslaw.com  
Tel: 213-330-7150; Fax: 213-330-7152

I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct; that I contracted to provide delivery services with a member of the Bar of this Court at whose direction this service was made; and that this Proof of Service was executed on August 23, 2007, at Los Angeles, California.

  
[Signature]

JUPAT NITSUTAKUL  
[Printed Name]